3-1485

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1485

THE CHOCTAW NATION and the CHICKASAW NATION,
Petitioners,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

LON KILE
P. O. Box 726
Hugo, Oklahoma 74743

Attorney for Petitioner

March, 1974

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Choctaw and Chickasaw Nations, petitioners herein, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered on the 10th day of January, 1974, in cause numbered 73-1447.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Tenth Circuit in this case was entered on the 10th day of January, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Can a state put into its permanent school fund monies which erroneously came to it and notwithstanding the Fourteenth Amendment thereafter spend the interest earned on such monies with immunity on the ground that its Constitution requires that interest and income from its permanent school fund must be applied each year for the benefit of the common schools?

STATEMENT OF THE CASE

The present appeal is the latest chapter in the dispute between certain Indian Tribes and the State of Oklahoma over the ownership of the bed of the Arkansas River between its confluence with the Grand River and the Oklahoma-Arkansas boundary. Brief reference to the history of this rather protracted litigation will place in focus the narrow issue presented by this appeal.

The Cherokees brought suit against Oklahoma and the holders of various sand, gravel and oil and gas leases granted by Oklahoma and covering parts of the land here in dispute. The relief sought was an accounting and an injunction. Oklahoma and certain of its lessees counterclaimed for a decree quieting title in Oklahoma. The Choctaws and Chickasaws were permitted to intervene and assert a joint claim with the Cherokees. On trial, judgment was rendered in favor of Oklahoma, and, on appeal by the Tribes, the Court of Appeals for the Tenth Circuit affirmed. *Cherokee Nation or Tribe of Indians in Oklahoma* v. *State of Oklahoma*, 402 F.2d 739 (10th Cir. 1968).

On remand Oklahoma contended that by its decision in *Choctaw Nation* v. *Oklahoma,* this Court had not decided present title to the river bed, but only that some time in the past the United States had conveyed title to the Tribes. Oklahoma further contended that *laches* precluded the Indians from recovering the river bed.

For their part, the Choctaw and Chickasaw Nations contended that the oil companies were trespassers, albeit good faith ones, and should be required to pay to the Indian Tribes the market value of the oil produced, less the cost of production. The trial court ruled that the Indian Tribes were not ". . . entitled to an accounting for any oil, gas or other minerals, including sand and gravel, or any interest therein, except lease rentals, bonuses and royalty payments taken or acquired by the defendants under or by reason of lease agreements with the State of Oklahoma . . ." The trial court required Oklahoma ". . . to account to the court for all monies at any time received pursuant to or under such leases or agreements and to deposit such monies received or owing, in the Registry of the Court . . ." The trial court then cancelled ". . . all leases and other agreements between the State of Oklahoma and the other defendants herein on and covering the property here involved . . ."

On appeal the Tenth Circuit affirmed both of those rulings and remanded the case for further proceedings, saying: [1]

> "The decision, now acquiesced in by the Indians, that they were not entitled to trespass damages left

[1] *Cherokee Nation* v. *State of Oklahoma,* 461 F.2d 674 (10 Cir. 1972), *cert. denied* 409 U.S. 1039 (1972).

the court with three alternatives, (1) to permit Oklahoma to retain the lease considerations, (2) to require Oklahoma to return those considerations to the lessees, or (3) to award the lease considerations to the Indians as the true owners of the leased land. The first merits little consideration. Oklahoma received money for leasing land which it did not own. To permit it to retain such money would approve unjust enrichment contrary to well recognized principles of equity. See Blake Construction Co. v. American Vocational Association, Inc., D.C. Cir., 419 F.2d 308, 311, and Doing v. Riley, 5 Cir., 176 F.2d 449, 457-459. The suggestions of Oklahoma that laches of the Indians precludes their recovery does not impress us. *The unexplained delay in title determination was mutual. The record contains nothing to show that any action, or nonaction, of the Indians disadvantaged Oklahoma. Oklahoma has suffered, and will suffer, no detriment other than payment to the rightful owners of the money which it wrongfully received as lessor.*" (Emphasis supplied.)

* * * * * *

"The judgment is affirmed so far as it (1) denies the claims of Oklahoma and its lessees and (2) requires an accounting and payment by Oklahoma and its lessees into the registry of the court."

On second remand the trial court conducted further hearings in which the state reported that it had received $786,541.67 as bonuses, rentals and royalties from sand and gravel leases and oil and gas leases which it had put into its permanent school fund and on which it had earned as interest $212,423.82. The state contended that from the $786,541.67 it received as bonuses, rentals and royalties, it should be reimbursed $59,125.05 as a fee for negotiating the leases and that from those funds it should also be reim-

bursed $33,442.90 as a fee for supervising those funds. The Choctaw and Chickasaw Nations contended that under principles of equity, the state should be required to account for not only the $786,541.67, which it had received from the leasing of the river bed, but also the $212,423.83 which the state had earned as interest on those funds, less the $33,-442.90 as a fee for supervising their investment. The State, however, contended that it had treated the land here involved as public land, the income from which, under its Constitution, was required to be placed into a permanent school fund to be used for the benefit of the common schools; that its Constitution required income realized from the permanent school fund must be used and applied each year for the benefit of the common schools; that in compliance with the mandate of its Constitution, it had spent the interest as it was received and therefore could not now "account" for the same.

The trial court refused to require Oklahoma to account for the interest and income received by it from the investments of the monies it received from leasing the land here involved, saying: "that in the particular circumstances of this case, it would be inequitable to require the State of Oklahoma to account for and deposit with the court for distribution to the Indian Nations the monies received as interest . . ." The Choctaw and Chickasaw Nations appealed.

In the Circuit Court both the Choctaw and Chickasaw Nations and Oklahoma argued the same three cases: (1) *Brunson* v. *Commissioners of the Land Office*, 292 Pac. 562 (Okla. 1930); (2) *Commissioners of the Land Office of Oklahoma* v. *Brunson*, 51 P.2d 500 (Okla. 1935); and (3)

State ex rel. Commissioners of the Land Office v. *Warden*, 242 P.2d 129 (Okla. 1952). The Tenth Circuit affirmed the trial court, saying:

> "In short, Oklahoma law, as we view it, does not dictate a reversal and, on the contrary, the trial court's disallowing income realized from the investment of the rentals (*sic.* bonuses, rentals and royalties) finds support in Oklahoma law. * * * We believe the trial court's action disallowing interest under all of the circumstances was equitable and not clearly erroneous, and at the same time we believe its action to be in accord with the Oklahoma law on the subject."

This is the question: Can a state put into its permanent school fund monies which never belonged to it and notwithstanding the Fourteenth Amendment thereafter spend the interest earned on such monies with immunity on the ground that its Constitution requires that interest and income from its permanent school fund must be applied each year for the benefit of the common schools?

REASONS FOR GRANTING THE WRIT

In its decision the Tenth Circuit notes that both the Indian Tribes and Oklahoma argued the three cases, *Brunson* v. *Commissioners of the Land Office*, 292 Pac. 562 (Okla. 1930); *Commissioners of the Land Office of Oklahoma* v. *Brunson*, 51 P.2d 500 (Okla. 1935); and *State ex rel. Commissioners of the Land Office* v. *Warden*, 242 P.2d 129 (Okla. 1952). As the Circuit Court did in its decision, we will also refer to these cases as *Brunson the First*, *Brunson the Second*, and *Warden*.

Petitioners contend that *Brunson the First* and *Warden* dictate a reversal of the trial court's judgment. The state contends, and in this contention they were sustained by the Tenth Circuit, that *Brunson the Second* controls the facts in this case. We will discuss each of these cases separately.

The Commissioners of the Land Office of Oklahoma claiming title to the bed of Red River advertised and sold oil and gas leases to Brunson and others, on the agreement that monies deposited as bonuses, rentals and forfeitures would be returned, if it should be determined that Oklahoma did not have title to the river bed. Subsequently this Court held in *Oklahoma* v. *Texas,* 259 U.S. 265, that Oklahoma had no title to the river bed. Brunson and other of the lessees made demand upon the Commissioners of the Land Office of Oklahoma to refund the monies that they had paid to the State as bonuses, rentals and forfeitures. The Commissioners of the Land Office refused the demand saying that they could not do so without an act of the Legislature. Brunson and other of the lessees brought action in mandamus to compel the return of the money. (*Brunson* v. *Commissioners of the Land Office,* 292 Pac. 562). The Supreme Court of Oklahoma, citing this Court's decision in *Ward* v. *Board of County Commissioners of Love County,* 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751, held "that statutory authority is not necessary to enable the state to refund monies unlawfully received by it," saying further:

> "In the case at bar, the state of Oklahoma had no title to the Red river bed and its attempted leasing thereof was null and void. The defendant commissioners received the money involved herein under an agreement to hold it pending the determination of the

ownership of said river bed and to return it if Oklahoma's title failed. To say that the defendants could transfer this money to the state in violation of such agreement and not incur any obligation to repay the same under such circumstances is nothing short of saying that the money of the plaintiffs could be taken without due process of law. After Oklahoma's title failed, it became the duty of the defendant commissioners to return this money to the plaintiffs.

* * * * * *

"The judgment of the lower court is reversed, and the cause is remanded, with directions to the district court of Oklahoma county to issue a peremptory writ of mandamus directed to the commissioners of the land office, other than the Governor, commanding them to issue or cause to be issued checks or vouchers in refund of the several sums of money deposited by the plaintiffs or their assignors as bonuses, rentals, and forfeitures, as disclosed by the record herein."

It was stipulated that the monies which the Commissioners of the Land Office received from the oil and gas leases had been placed in the permanent school fund for loans.[2] The Commissioners of the Land Office refunded the bonuses, rentals and forfeitures but no interest. Brunson and others commenced a second action for a writ of mandamus against the Commissioners of the Land Office to compel the payment of interest on those funds. The trial court granted the writ. The Commissioners of the Land Office appealed (*Commissioners of the Land Office* v. *Brunson*, 51

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[2] The Court so stated in *Brunson the Second* in the second paragraph of the second column of page 501.

P.2d 500),[3] contending that the judgment rendered in *Brunson the First* was ". . . an adjudication, not only as to every question, issue and fact which was presented, but also upon those which might have been presented in the first suit; that, therefore, this action for interest cannot now be maintained."

The Supreme Court of Oklahoma said:[4]

"Without resting the judgment here, we determine the matter upon another ground which is that petitioners wholly failed to prove the existence of any sum of money representing interest on said trust fund.

* * * * * *

". . . if ever interest was recovered by the state as the result of a loan of permanent school funds, of which in fact, though not in law, the trust fund became a part, the interest so recovered by the state has long since been expended. There is an utter absence of proof showing the existence of such a sum of money as is sought to be recovered by this writ.

* * * * * *

"The interest, if any was ever paid upon the loan of this money, which in fact, but by error of law, became a part of the permanent school fund, has long since lost its identity and has been expended. The interest, if any was ever derived, is not similarly situated with the trust fund itself. The permanent school fund, as the designation indicates, was intended to be permanent. It may not be expended for current expense purposes. If funds wrongfully became a part of it, they may rightfully be recovered *but accruals thereon are expendable*

[3] It is of more than passing interest to note that the composition of the Supreme Court of Oklahoma completely changed during the interval (1930-1935) between *Brunson the First* and *Brunson the Second.*

[4] First paragraph, second column of page 501.

and by law they are required to be disbursed." (Emphasis supplied.)

In *Brunson the Second,* the Court raised the question as to whether ". . . if ever interest was recovered by the state as the result of a loan of permanent school funds . . ." As demonstrated by the opinion of the Circuit Court the accounting made by Oklahoma indicated that down through the years it had received total receipts in the sum of $786,541.67 from the leasing of the Arkansas River bed, which is the subject of this litigation. Such receipts were placed in the permanent school funds. It was difficult to determine the precise amount of income realized from the investment of the particular receipts realized from the leasing of the Arkansas River bed. However, the figure of $212,423.83 was presented to the trial court as being "an educated guess" as to the interest earned from the receipts realized from the state's rental of this river bed land. The Circuit Court said: "There has been no challenge to this 'educated guess' and accordingly the sum of $212,423.83 is the amount here in controversy."

In *Brunson the Second,* the Court said:

". . . if ever interest was recovered by the State as a result of a loan of permanent school funds . . . the interest so recovered by the State has long since been expended.

* * * * * *

"The interest, if any was ever derived, is not similarly situated with the trust fund itself . . . If funds wrongfully become a part of it, (*sic.* the permanent school fund) they may rightfully be recovered, but accruals thereon . . . are required to be disbursed."

The Tenth Circuit said:

> ". . . We agree with the State that *Brunson the Second* is more akin to the present case, and the trial court's refusal in the instant case to require the State to account to the Indian Tribes for income realized from the investment of the rentals would seem to us to be in accord with the reasoning of *Brunson the Second*. In short, Oklahoma law, as we view it, does not dictate a reversal, and, on the contrary, the trial court's disallowing income realized from the investment of the rentals finds support in Oklahoma law."

Following *Brunson the Second*, the Supreme Court of Oklahoma had before it *State ex rel. Commissioners of the Land Office* v. *Warden* (1951), 242 P.2d 129, 131, 132, which provided it with a further occasion to review the impact of Section 3 of Article XI of the Constitution of Oklahoma on funds wrongfully held by the Commissioners of the Land Office.

In *Warden*, the State of Oklahoma on relation of the Commissioners of the Land Office filed suit to foreclose a mortgage covering some 107 acres of land. Pursuant to foreclosure judgment the property was sold to the Commissioners of the Land Office at sheriff's sale which was confirmed. Subsequently, upon motion of one of the defendants who was in the armed forces, the trial court vacated the foreclosure judgment and the sale proceedings founded thereon. On appeal the Supreme Court of Oklahoma affirmed the trial court. (*State ex rel. Commissioners* v. *Warden*, 197 Okla. 97, 168 P.2d 1010). The mortgaged lands were riparian to the Canadian River. Immediately across the river from the mortgaged lands was another tract of land, the

fee to which was owned by the Commissioners of the Land Office. A short time prior to the order vacating the foreclosure judgment, the Commissioners of the Land Office, being in possession of both tracts, had executed several oil and gas leases, each covering both a portion of the land across the river which it owned in fee and a portion of the land covered by the mortgage. When the cause was remanded and the defendants permitted to discharge the mortgage debt and retain title, it became necessary for the trial court, because of the change in the common boundary line between the fee lands and the mortgage lands occasioned by the change in the course of the river, to determine the location of the common boundary line of the two tracts and the acreage in each, so that the bonus money received from the sale of the oil and gas leases might be equitably distributed.

On November 22, 1946, the trial court rendered judgment fixing the boundaries of the property and awarding the defendants a net judgment, after deduction of the mortgage indebtedness, of $33,844.48, with interest thereon at six per cent per annum from that date until paid. Thereafter, the Commissioners of the Land Office paid the defendants approximately $13,000.00 on the judgment, continuing to hold the balance of some $20,000.00. Both the Commissioners of the Land Office and the defendants appealed to the Supreme Court of Oklahoma from that judgment, each urging that the trial court erred in the location of the boundary line.

On appeal the Supreme Court of Oklahoma held that the defendants were the owners of a substantially larger

acreage than had been adjudged theirs by the trial court, and remanded the cause for further proceedings. (*State ex rel. Commissioners of the Land Office* v. *Warden*, 200 Okla. 613, 198 P.2d 402).

Upon further hearing, after remand, the trial court rendered judgment for the defendants on October 28, 1948, in the principal amount of slightly more than $27,000.00, reserving for further consideration the question of interest on the amount unpaid on the original judgment of November 22, 1946. The Commissioners of the Land Office paid the defendants the principal amount of the judgment of October 28, 1948. Thereafter, on December 16, 1948, the trial court rendered judgment against the Commissioners of the Land Office for the additional sum of $2,378.82, being interest at the rate of six per cent per annum on the unpaid $20,685.39 portion of the judgment of November 22, 1946, until its payment in October 1948.

The Commissioners of the Land Office then appealed to the Supreme Court of Oklahoma from the trial court's judgment of December 16, 1948 for $2,378.82, the item of interest.

We now go to the decision of the Supreme Court: [5]

"[3] Plaintiff then raises the question as to where the money will come from to pay such item since the State's portion of the bonus money became a part of the permanent school fund by virtue of secs. 8 and 9 of the Enabling Act and any payment out of the fund for interest would violate secs. 2 and 3 of Art. XI, Okla. Const. citing School District No. 23 of Okfuskee County

[5] Third paragraph of the second column page 131.

v. Commissioners of Land Office, 166 Okl. 226, 27 P.2d 149. With this contention we cannot agree.

"It must be borne in mind that this phase of this case is, to all intents and purposes, a suit in accounting and that the judgment, although personal, amounts to an apportionment of the bonus money to the parties and in the proportion to which each is entitled. By the judgment, from which this appeal was taken, the trial court, in effect, adjudged that, of the monies in plaintiff's hands, defendants are the owners of, and entitled to, $29,554.95 which is composed of two items, namely: $27,176.13 principal and $2,378.82 interest. Thus, this sum of $29,554.95 was defendants' money to which the state had never obtained title. Until its division by judgment in accounting, the entire amount received as bonus payments constituted a trust fund, separate, apart and distinguishable from all other funds of the Land Office. As was said in the first case of Brunson et al. v. Com'rs of Land Office et al., 145 Okl. 219, 292 P. 562, 563, 'The money involved herein never became the property of the state, and there was no fund into which the same could legally be transferred from the official depository. * * * To say that the defendant could transfer this money to the state * * * under such circumstances is nothing short of saying that the money of the plaintiffs could be taken without due process of law. After Oklahoma's title failed, it became the duty of the defendant commissioners to return this money.'

"Thus, the funds, not having yet become the property of the state, are trust funds and are not subject to the provisions of sections 2 and 3 of Article XI of the Oklahoma Constitution."

As the Tenth Circuit views the rule in Oklahoma (and by its decision spreads that rule over the country) if the Constitution directs the expenditure of certain monies,

whether rightfully or wrongfully acquired, the state may follow its Constitutional directive with no regard to the due process clause of the Fourteenth Amendment. The Tenth Circuit sees the rationale of *Warden* as being applicable only to post-judgment interest. But the Supreme Court of Oklahoma particularly pointed out in *Warden:*

> ". . . of the money in plaintiff's (*sic.* the Commissioners of the Land Office) hands, defendants are the owner of and entitled to $29,554.95, *which is composed of two items,* namely: $27,176.13 principal and $2,378.82 interest. *Thus, this sum of $29,554.95 was defendant's money to which the state had never obtained title.* (Emphasis supplied.)
>
> * * * * * *
>
> "Thus, the funds, not having yet become the property of the state, are trust funds and are not subject to the provisions of Sections 2 and 3 of Article XI of the Oklahoma Constitution."

And the *caveat* in *Warden's* citation from *Brunson the First:*

> "The money involved herein never became the property of the state, and there was no fund into which the same could legally be transferred from the official depository. * * * To say that the defendant could transfer this money to the state * * * under such circumstances is nothing short of saying that the money of the plaintiffs could be taken without due process of law. After Oklahoma's title failed, it became the duty of the defendant commissioners to return this money."

In arguing this case before the trial court and the Tenth Circuit the Commissioners of the Land Office urged that the money was gone, the interest had been spent, and

that the Oklahoma Constitution prohibited its repayment from the permanent school fund. But consider the language of Section 2 of Article XI of the Oklahoma Constitution:

> "§ 2. Permanent school fund—How constituted—Use—Reimbursement for losses
>
> "All proceeds of the sale of public lands that have heretofore been or may be hereafter given by the United States for the use and benefit of the common schools of this State, all such per centum as may be granted by the United States on the sales of public lands, the sum of five million dollars appropriated to the State for the use and benefit of the common schools in lieu of sections sixteen and thirty-six, and other lands of the Indian Territory, the proceeds of all property that shall fall to the State by escheat, the proceeds of all gifts or donations to the State for common schools not otherwise appropriated by the terms of the gifts, and such other appropriations, gifts, or donations as shall be made by the Legislature for the benefit of the common schools, shall constitute the permanent school fund, the income from which shall be used for the maintenance of the common schools in the State. The principal shall be deemed a trust fund held by the State, and shall forever remain inviolate. It may be increased, but shall never be diminished. *The State shall reimburse said permanent school fund for all losses thereof which may in any manner occur,* and no portion of said fund shall be diverted for any other use or purpose." (Emphasis supplied.)

Thus, the urgings of the Commissioners of the Land Offices are shadow and not substance. This Court can direct that the interest, never having become the property of the state, be repaid either by the state or by the Com-

missioners of the Land Office from the permanent school fund, to be reimbursed by the state.

The facts in this case are no more complicated than the facts in *Warden*. And the issues here are as simple as the issues there. But the Tenth Circuit seems to say that if the trial court in its wisdom did not require the Tribes to reimburse the state for $33,243.90 as a fee for supervising their investment of the $786,541.67, then it would be inequitable to require the state to refund the $212,423.83 interest which it acquired during the time it wrongfully possessed those funds. But the equities seem somewhat out of balance, particularly so when the Indian Tribes have always agreed that the administrative expenses may be deducted from the interest and only the net balance refunded to them.

It should be remembered that following remand (*Cherokee Nation* v. *State of Oklahoma*, 461 F.2d 674) the Tenth Circuit said:

> "The decision, now acquiesced in by the Indians, that they were not entitled to trespass damages left the court with three alternatives, (1) to permit Oklahoma to retain the lease considerations, (2) to require Oklahoma to return those considerations to the lessees, or (3) to award the lease considerations to the Indians as the true owners of the leased land. The first merits little consideration. Oklahoma received money for leasing land which it did not own. To permit it to retain such money would approve unjust enrichment contrary to well recognized principles of equity. See *Blake Construction Co.* v. *American Vocational Association, Inc.*, D.C. Cir., 419 F.2d 308, 311, and *Doing* v. *Riley*, 5 Cir., 176 F.2d 449, 457-459. The suggestions of Oklahoma that laches of the Indians precludes their recovery does

not impress us. *The unexplained delay in title determination was mutual. The record contains nothing to show that any action, or nonaction, of the Indians disadvantaged Oklahoma. Oklahoma has suffered, and will suffer, no detriment other than payment to the rightful owners of the money which it wrongfully received as lessor.*" (Emphasis supplied.)

CONCLUSION

The monies which the State of Oklahoma on relation of the Commissioners of the Land Office wrongfully received as lessor, is composed of two items: Bonuses, rentals and royalties in the amount of $786,541.67 and interest in the amount of $212,423.83. Those funds never became the property of the state. They are trust funds and under the authority of *Warden* and *Brunson the First* are not subject to the provisions of Sections 2 and 3 of Article XI of the Oklahoma Constitution.

Should the decision of the Tenth Circuit remain the law of the land, then by the simple expedience of a statute, states can, as Oklahoma has actually done, wrongfully keep and spend for its own uses, monies over which it has no right or title and without regard to the due process clause of the Fourteenth Amendment.

The decision of the Tenth Circuit is a major erosion of the due process clause of the Fourteenth Amendment. It should not be allowed to stand.

It is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

LON KILE
P. O. Box 726
Hugo, Oklahoma 74743

Attorney for Petitioner

March, 1974

APPENDIX

PUBLISH

FILED
JAN 10 1974
HOWARD K. PHILLIPS
Clerk
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY TERM — 1974

THE CHOCTAW NATION AND THE CHICKASAW NATION,	)	
Plaintiffs-Appellants,	)	
v.	)	NO. 73-1447
STATE OF OKLAHOMA AND THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
For the Eastern District of Oklahoma
(D.C. No. 6219)

Lon Kile (Kile & Rabon, on the brief), for Plaintiffs-Appellants.

Odie A. Nance, Assistant Attorney General, and R. R. Williamson, Jr. (Larry Derryberry, Attorney General of Oklahoma, on the brief), for Defendants-Appellees.

[APPENDIX]

Before LEWIS, Chief Judge, and SETH and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

The present appeal is the latest chapter in the dispute between certain Indian Tribes and the State of Oklahoma over the ownership of the bed of the Arkansas River between its confluence with the Grand River and the Oklahoma-Arkansas boundary. Brief reference to the history of this rather protracted litigation will place in focus the narrow issue presented by this appeal.

The Cherokees brought suit against Oklahoma and the holders of various sand, gravel, and oil and gas leases granted by Oklahoma and covering parts of the land here in dispute. The relief sought was an accounting and an injunction. Oklahoma and certain of its lessees counterclaimed for a decree quieting title in Oklahoma. The Choctaws and Chickasaws were permitted to intervene and assert a joint claim with the Cherokees. On trial, judgment was rendered in favor of Oklahoma, and, on appeal by the Tribes, we affirmed. Cherokee Nation or Tribe of Indians in Oklahoma v. State of Oklahoma, 402 F.2d 739 (10th Cir. 1968).

On appeal to the Supreme Court that court reversed and held that the United States had conveyed title to the bed of the Arkansas River below its junction with the Grand River within the present State of Oklahoma in the various grants it had theretofore made the several Tribes. The case was then remanded to the trial court for further proceedings. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

On remand to the trial court a dispute first arose as to whether the Supreme Court by its opinion had decided *present* title to the river bed, or had only determined that

sometime in the *past* the United States had conveyed title to the Tribes. On this particular matter the trial court held that the Supreme Court had determined present title, and declined to permit Oklahoma to relitigate the matter.

A second dispute arose on remand concerning damages. The Choctaws, on the one hand, initially contended, though they later abandoned their contention, that they were entitled to the value of the minerals taken from the river bed. The lessees, at the other end of the spectrum, themselves sought return of the rentals paid the State. The State in turn contended that damages should be limited to those recoverable in a trespass action. The order of the trial court was that the leases should be cancelled and that Oklahoma should account for, and pay into the registry of the court, all sums received by Oklahoma as lease bonuses, rentals, and royalties, which in turn would be given the Tribes.

On appeal, we affirmed both of these particular rulings of the trial court, though we did reverse a portion of the trial court's judgment which has no bearing on the present controversy, and then remanded the case for further proceedings. Cherokee Nation v. State of Oklahoma, 461 F.2d 674 (10th Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972).

On second remand, the trial court conducted further hearings and eventually approved an accounting made by the Commissioners of the Land Office of the State of Oklahoma which showed total receipts derived from the lands in question in the amount of $786,541.67. At the same time, the trial court disallowed certain offsets claimed by the Commissioners in the amount of $59,125.05, such sum representing "direct costs" and "administrative expenses." At this hearing, Oklahoma immediately paid the sum of $786,541.67 into the registry of the court and it is our understanding that such funds have been invested by the court and have been drawing interest while the present appeal was being perfected.

[APPENDIX]

The present appeal relates to the refusal of the trial court to require Oklahoma to account for and pay into court the interest and income received by it from the investment of the receipts received from the leasing of the river bed land here in question. In thus disallowing such interest and income, the trial court also refused certain credits amounting to $33,442.90 claimed by Oklahoma for other administrative expense. The trial court clearly indicated that if it awarded such interest and income, it would then allow the claimed credit; but disallowed each, on the ground that under the circumstances, it would be "inequitable" to hold otherwise. The Choctaws and the Chickasaws, but not the Cherokees, now appeal the order of the trial court refusing to require Oklahoma to account for the interest and income realized by it on the investment of receipts realized from leases on the Arkansas River bed. Before considering the exact nature of the "interest" here claimed by the Choctaws and the Chickasaws, reference should first be made to certain provisions of the Oklahoma Constitution.

Section 2 of Article XI of the Oklahoma Constitution creates a so-called permanent school fund to be used for the benefit of the common schools in the state. Section 6 of that same article provides for the investment of monies placed in the permanent school fund, and, as concerns the return on such investments, section 2 specifically provides that it is *only* the income realized from the fund which is to be used for the maintenance of the common schools, and that the principal is deemed a trust fund which shall remain inviolate and never diminished, though it may be increased. Section 3 of Article XI of the Oklahoma Constitution provides that the interest and income derived from the investment of the permanent school fund monies shall be used and applied each year for the benefit of the common schools in the state.

The Commissioners, relying on official opinions of the state's attorney general, have historically treated the Arkansas River bed lands as falling in the category of undesignated public lands and accordingly the rentals derived from the leasing of such river bed land have been deemed a part of the permanent school fund and such rentals have in fact in the past been delivered by the Commissioners into the school fund, where it has been commingled with many other common school fund collections. The funds constituting the permanent school fund have, as indicated, been invested, and, pursuant to the aforesaid constitutional provisions, the income therefrom has been distributed to the common schools. Section 3 states that such income "shall be used and applied each year" and we are advised that as a practical matter the income from the permanent school fund is distributed on a monthly basis to each county in the state on a pro rata basis based on school attendance.

As indicated, the accounting made by Oklahoma indicated that down through the years it had received total receipts in the sum of $786,541.67 from the leasing of river bed land of that portion of the Arkansas River which is the subject of this litigation. In this general regard, we are further advised that Oklahoma first began selling sand and gravel leases from the river bed of the Arkansas River very shortly after Statehood in 1907, and that the practice of leasing such lands has continued to date. Such receipts were, as mentioned above, placed in the permanent school fund. They were, however, but a part of the total permanent school fund, and the funds from the various sources having been commingled, it was difficult to determine with any degree of exactitude the precise amount of income utilized from the investment of the particular receipts realized from the leasing of the Arkansas River bed. However, the figure of $212,423.83 was presented to the trial court as being an "educated guess" as to the income derived over the years from the receipts realized from the State's rental

of this river bed land. There has been no challenge to this "educated guess" and accordingly the sum of $212,423.83 is the amount here in controversy.

Before considering the argument advanced here as to why the judgment of the trial court should be reversed, we would first note the true nature of the interest thus claimed. As indicated, we are not here concerned with interest *after* judgment. The State has already paid into the registry of the court the monies determined to be due the Indian Tribes, and did so immediately upon such determination, and that particular sum has as a practical matter been invested and is now drawing interest. Rather, it is the position of the Indian Tribes that Oklahoma should be required to account for all interest and income derived from the investment of the rentals on the river bed lands, apparently from the date of the first lease of such land, years ago, to the present time.

In this court, counsel for both the Indian Tribes and the State argue the same three cases. They are: (1) Brunson v. Commissioners of the Land Office, 292 P. 562 (Okl. 1930), hereinafter referred to as *Brunson the First;* (2) Commissioners of the Land Office of Oklahoma v. Brunson, 51 P.2d 500 (Okl. 1935), hereinafter referred to as *Brunson the Second;* and (3) State ex rel. Commissioners of the Land Office v. Warden, 242 P.2d 129 (Okl. 1952). In this regard the Indian Tribes contend that *Brunson the First* and *Warden* dictate a reversal of the trial court's judgment. As concerns *Brunson the Second,* counsel suggests that the Oklahoma Supreme [Court] in that case misconceived and failed to follow its earlier decision in *Brunson the First,* and in any event, that its subsequent holding in *Warden* overruled, in effect if not in so many words, *Brunson the Second.*

As concerns these same three cases, Oklahoma argues that *Brunson the First* and *Warden* are inapplicable to the present controversy and that *Brunson the Second* is akin to

the present controversy and supports the trial court's action disallowing recovery of interest. We are in accord with the State's analysis of these three cases. A consideration of this trilogy will indicate our thinking.

The *Brunson* cases arose out of a dispute between Oklahoma and Texas as to the ownership of the river bed of the Red River, both claiming title thereto. Before this controversy was finally resolved by the Supreme Court adversely to Oklahoma, the latter issued certain oil and gas leases to Brunson on the river bed of the Red River. These leases provided that all rentals would be held by the Commissioners of the Land Office, and, if it should be later determined that Oklahoma did not have title, then the money so held would be refunded. The money thus received from Brunson was in fact held only briefly by the Commissioners in an escrow account and then transferred to the official state depository. After the Supreme Court's resolution of the matter, Brunson made demand upon the Commissioners to refund the rentals previously paid. The Commissioners refused, and Brunson brought suit. The trial court ruled in favor of the Commissioners, but on appeal the Oklahoma Supreme Court reversed.

In *Brunson the First*, the Oklahoma Supreme Court, in holding that Brunson was entitled to a refund of all rentals paid the State when the latter's title failed, made the following pertinent comment:

> "In the case at bar, the state of Oklahoma had no title to the Red river bed and its attempted leasing thereof was null and void. The defendant commissioners received the money involved herein under an agreement to hold it pending the determination of the ownership of said river bed and to return it if Oklahoma's title failed. To say that the defendants could transfer this money to the state in violation of such agreement and not incur any obligation to repay the

same under such circumstances is nothing short of saying that the money of the plaintiffs could be taken without due process of law. After Oklahoma's title failed, it became the duty of the defendant commissioners to return this money to the plaintiffs."

On remand after *Brunson the First*, the trial court entered judgment requiring the Commissioners to refund all rentals received by them from Brunson under the lease agreement. Such rentals, incidentally, had, as in the instant case, been placed in the permanent school fund. Additionally, Brunson then asked the trial court to require the Commissioners to also account for the interest and income realized from the investment of the rentals for the time when such were a part of the school fund. There, as here, the right to recovery was based on general principles of equity whereby trustees are required to account to the beneficiary for all profits acquired out of, or by reason of, the trust estate. The trial court granted a peremptory writ of mandamus requiring the Commissioners to pay Brunson the sum of $9,500, said sum representing the income realized from the investment of the lease rentals. In *Brunson the Second*, the Oklahoma Supreme Court reversed this ruling of its trial court.

In *Brunson the Second*, as here, the provisions of sections 2 and 3 of Article XI of the Oklahoma Constitution were brought into play. There, as here, the so-called interest and income realized from the investment of the monies in the permanent school fund had periodically been distributed to the common schools of the state pursuant to constitutional provision and had in turn then been spent by the schools. Hence, there remained no corpus, as concerns income monies, against which Brunson could proceed. Accordingly, the Oklahoma Supreme Court, after rejecting other possible grounds for reversal, reversed on the narrow ground that Brunson had failed to prove "the existence of any sum of money representing interest on said trust fund."

In thus holding, the Oklahoma Supreme Court further observed as follows:

> "The difficulty in the case at bar is the application of the rule to the facts. Herein there is no balance remaining intact equal to or greater than the alleged accumulations on the trust fund. The interest, if any was ever paid upon the loan of this money, which in fact, but by error of law, became a part of the permanent school fund, has long since lost its identity and has been expended. The interest, if any was ever derived, is not similarly situated with the trust fund itself. The permanent school fund, as the designation indicates, was intended to be permanent. It may not be exhausted for current expense purposes. If funds wrongfully become a part of it, they may rightfully be extracted and recovered, but accruals thereon are expendable and by law they are required to be disbursed. There is no presumption of the existence of the fund which is sought to be secured by warrants to be drawn under the authority of the writ issued below."

In *Warden*, the Commissioners had invested monies from the permanent school fund in a first mortgage on a tract of land consisting of some 107 acres. The Commissioners foreclosed on this mortgage, and while the tract was thereafter in their possession, the Commissioners received rentals from several oil and gas leases which they granted on the property in question. These oil and gas leases were entered into with the approval of the court in which the foreclosure proceedings were still pending, such approval being on the condition the proceeds from such leases be held subject to order of the court. Later, the foreclosure proceedings were set aside and judgment was subsequently entered in favor of the mortgagor and against the Commissioners for the rentals received by the Commissioners when they were in possession, such judgment providing for "interest thereon at 6% per annum from said date until paid."

The Commissioners immediately paid a portion, but not all, of this judgment and later appealed the unpaid portion of the judgment as well as the award of interest thereon. On appeal, the Oklahoma Supreme Court affirmed. In affirming, that court held that the very narrow question was whether a statute providing for interest at the rate of 6% per annum on a judgment in a court of record from and after its date applied to the State when the latter is "voluntarily" within the jurisdiction of the court. The court answered the question in the affirmative.

As indicated, the position of the Indian Tribes in this court is that *Brunson the First* and *Warden* require reversal. We disagree, as such is not our reading of those cases. In *Brunson the First*, the court was concerned only with the rentals and not with the income realized from the investment of the rentals while the latter were in the possession of the State. In *Warden*, the court was concerned with the State's liability for statutory interest *after* judgment had been rendered against it in a proceeding which the State itself had instituted. Neither *Brunson the First* nor *Warden* is the present case. We agree with the State that *Brunson the Second* is more akin to the present case, and the trial court's refusal in the instant case to require the State to account to the Indian Tribes for income realized from the investment of the rentals would seem to us to be in accord with the reasoning of *Brunson the Second*. In short, Oklahoma law, as we view it, does not dictate a reversal, and, on the contrary, the trial court's disallowing income realized from the investment of the rentals finds support in Oklahoma law.

The Indian Tribes, though relying primarily on *Brunson the First* and *Warden* for reversal, also take aim at the trial court's statement that "in the particular circumstances of this case it would be inequitable" to permit the Tribes to recover interest and income realized through the years

from investment of lease rentals. The Tribes, citing no authority, suggest that it was inequitable to disallow such interest. We disagree. The problem faced by the trial court in the instant case is about the same as that faced by the court in *Brunson the Second,* namely, the monies for which an accounting was sought were no longer in existence, having been expended by the State pursuant to constitutional mandate. Facing the realities of the situation, then, the trial court here disallowed recovery of such interest and income and at the same time disallowed credit for administrative expense in connection therewith. Under the circumstances of this case we cannot in good conscience say that the trial court's concept of what was "doing equity" between the parties was erroneous. In this regard, we would refer briefly to our second opinion in this controversy, Cherokee Nation v. State of Oklahoma, 461 F.2d 674 (10th Cir. 1972).

The trial court on first remand had the question of selecting the proper manner in which an accounting should be made. It ultimately determined that the State should account for all sums received as lease bonuses, rentals, and royalties. In rejecting the claim of the Choctaws that they were entitled to the value of the minerals taken from the river bed down through the years, the trial court noted that the Tribes had owned the river bed for some 140 years without doing anything about it, and that Oklahoma for almost 63 years had acted in good faith under the belief that it owned the bed.

On second appeal to this court, we upheld the trial court's selection of what under the circumstances it deemed to be the proper manner and extent of the accounting to be made by the State, i.e., a turnover of rentals received by Oklahoma to the Tribes. In thus affirming, we stated that the trial court had reached the fairest and best result possible in a difficult situation, and observed that in an equitable proceeding, such as this, the trial court should give "what-

ever relief may be necessary under the circumstances." So, in our second opinion in this matter, we declined to hold that the trial court's determination as to how damages would be ascertained was inequitable under the circumstances there presented and, on the contrary, we believed its disposition of the matter to be fair and proper. We concluded there by holding that the trial court's choice as to how damages should be determined was not clearly erroneous and its resolution of the matter properly and satisfactorily disposed of a troublesome problem. In that case we then went on to say that "without exploring whether Oklahoma law controls damages in a federal equity action," we were at the same time convinced that the Oklahoma law on the subject also sustained the trial court's choice as to measure of damage.

So, too, in the instant case, we believe the trial court's action disallowing interest under all the circumstances was equitable, and not clearly erroneous, and at the same time we believe its action to be in accord with the Oklahoma law on the subject.

Judgment affirmed.

CERTIFICATE OF SERVICE

Service of the foregoing Petition for Writ of Certiorari has been made this ..... day of ..... by mailing three copies postage fully paid to:

Larry Derryberry
Attorney General State of Oklahoma
State Capitol
Oklahoma City, Oklahoma 73105
and
Legal Division
Commissioners of the Land Office
State Capitol
Oklahoma City, Oklahoma 73105

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In the
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-1485

THE CHOCTAW NATION and THE CHICKASAW NATION,
Petitioners,

VERSUS

STATE OF OKLAHOMA and THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF CASE

The petitioners complain of an order entered on February 6, 1973 by the United States District Court for the Eastern District of Oklahoma.

This order approved the accounting made by the Commissioners of the Land Office of the State of Oklahoma showing receipts derived from lands constituting the Arkansas River bed in the total amount of $786,541.67. Further, the order disapproved offsets claimed by the Commissioners of the Land Office in the amount of $59,125.05.

In addition, the order also recited that "it would be inequitable" to require the State to account for and deposit with the court the monies received as interest, and disallowed any credits to the Commissioners of the Land Office for administrative expenses in connection therewith.

ISSUE

WHETHER THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA ERRED IN REFUSING, UPON LEGAL AND EQUITABLE GROUNDS, TO REQUIRE THE COMMISSIONERS OF THE LAND OFFICE FOR THE STATE OF OKLAHOMA TO ACCOUNT FOR AND PAY INTO COURT INTEREST ON RECEIPTS COLLECTED BY IT FROM LANDS CONSTITUTING THE RIVER BED OF THE ARKANSAS RIVER, WHICH RECEIPTS WERE LATER DETERMINED TO BELONG TO PETITIONERS AND OTHERS.

REASONS FOR DENYING THE WRIT

As to the merits of this case there appear to be no viable issues not raised in the Tenth Circuit. As to the exposition of the applicable law and proper interpretation of that law, the State of Oklahoma and the Commissioners of the Land Office of the State of Oklahoma cannot improve upon the opinion rendered by the United States Court of Appeals, Tenth Circuit, in Case No. 73-1447. This opinion is attached as an exhibit to the Choctaws' and Chickasaws' Petition for a Writ of Certiorari. The State of Oklahoma and the Commissioners of the Land Office respectfully request this Court to read and accept the opinion of the Tenth Circuit Court as the argument of the State of Oklahoma and the Commissioners of the Land Office in this case.

The only issue not fully covered in the opinion in Case No. 73-1447 is the unadorned conclusion of the Choctaw Nation and the Chickasaw Nation that "The decision of the Tenth Circuit is a major erosion of the due process clause of the Fourteenth Amendment." No valid argument is given to support this premise nor do we believe that any facts or reasons to support such a dogmatic statement exist. In this respect we would refer once again to the argument as posed by the Tenth Circuit opinion in Case No. 73-1447, page VII, *et seq.*, of the brief submitted to this Honorable Court by the attorney for the Chickasaws and Choctaws. We would like to place particular emphasis on the Tenth Circuit's interpretation of the differences between "Brunson the First," the *Warden* case and "Brunson the Second," and further submit that only "Brunson the Second" had an analogous fact situation to the case at bar.

We further submit that an examination of the brief of the Choctaws and Chickasaws does not cite a single case nor even give an applicable reason in support of granting a writ of certiorari that meets the criteria of Rule 19 of this Court.

CONCLUSION

The state of Oklahoma and the Commissioners of the Land Office submit that nothing has been presented by the Choctaws and the Chickasaws that would warrant entertainment by this Court of a writ of certiorari.

The Commissioners of the Land Office of the State of Oklahoma, as trustee of an inviolable trust for the common schools of the State of Oklahoma, collected monies for sand and gravel and oil and gas leases from lands lying within the navigable portion of the Arkansas River. This was done in good faith and under the law as it was perceived to be at the time said funds were collected. These funds were commingled with other funds and invested at varying rates of interest throughout the years. Acting under the law then existing, the Commissioners of the Land Office distributed the income from these commingled funds to the common schools in all counties of the State of Oklahoma on a per pupil basis for each county. It is impossible to determine with any degree of accuracy the exact amount that was earned in interest income and even more impossible to determine how much income from river bed money was distributed to the individual school systems. There exists no vehicle for the State of Oklahoma to recover back from the counties the monies paid to them for common school purposes. The Commissioners of the Land Office are forbidden by law to diminish the corpus of the trust. There is no other fund controlled by the Commissioners of the Land Office from which such interest could be paid. The State believes that it would be inequitable for the Court to direct it to pay nonexistent, illusory funds to the petitioners. If the Court

follows the rule laid down in the *Commissioners of the Land Office* v. *Brunson,* 51 P.2d 500, and holds that the petitioners have not proved the existence of such a fund, there can be no recovery, and, in that event, the Commissioners of the Land Office believe that the principles of justice and equity will be best served.

Respectfully submitted,

LARRY DERRYBERRY
Attorney General of Oklahoma
JAMES H. GRAY
Assistant Attorney General
112 State Capitol
Oklahoma City, Oklahoma 73105

Attorney for Respondent
State of Oklahoma

R. R. WILLIAMSON, JR.
Jim Thorpe Building
Oklahoma City, Oklahoma 73105

Attorney for Respondents
The Commissioners of the Land Office
of the State of Oklahoma

May, 1974

CERTIFICATE OF MAILING

This is to certify that I mailed three true copies of the foregoing instrument to which this certification is attached, to the following named counsel of record:

Kile and Rabon
P. O. Box 726
Hugo, Oklahoma 74743

MAY 17 1974

R. R. WILLIAMSON, JR.